Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MISSOURI NETWORK ALLIANCE, LLC 2005 W. Broadway Bldg. A Suite 215 Columbia, MO 65203, **COMPLAINANT,** v. **SPRINT COMMUNICATIONS COMPANY L.P.** 6200 Sprint Parkway Overland Park, KS 66251, **DEFENDANT.**	Proceeding No. 18-236 EB-18-MD-004

SPRINT'S MEMORANDUM OF LAW IN OPPOSITION TO MISSOURI NETWORK ALLIANCE'S FORMAL COMPLAINT

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Table of Contents

Table of Authorities

Cases **Page(s)**

Administrative Authorities

Statutes and Regulations

Other Authorities

SUMMARY

Missouri Network Alliance, LLC (MNA) complains here that Sprint's alleged failure to pay its tariffed access charges violates Section 201(b) of the Communications Act. MNA's complaint has no merit, first, because MNA's tariff is invalid. Sprint owed MNA no access charge payments in the first place, and its non-payment was appropriate. As the Commission is aware, Sprint will separately effect the referral of that legal issue through its own formal complaint against MNA, and so incorporates that argument here.

Setting aside the validity of MNA's tariff, MNA recognizes, as it must, that the Commission's decisions in *All American Telephone* crystalized a long line of authority barring collections actions under Section 201(b).[1] As the Commission held there, "a failure to pay tariffed access charges does not constitute a violation of the Act,"[2] and for "twenty years, ... long-standing Commission precedent" has provided the same.[3] The Commission dismissed in *All American Telephone* the idea that self-help had anything to do with this, noting that, while it did not "endorse" non-payment of tariffs "outside the context of any applicable tariffed dispute resolution provisions," such non-payment did not "violate[] the Act itself [including Section 201(b)]."[4]

In light of this, MNA makes two arguments to explain why this case should be anything other than a straightforward application of that well-settled rule. Neither is persuasive. First,

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1 MNA Brief 16–20.

2 *All Am. Tel. Co., e-Pinnacle Commc'ns, Inc., & ChaseCom v. AT&T Corp.*, 26 FCC Rcd. 723 ¶ 12 (2011) ("*All American Telephone*") (original appears in all italics).

3 *Id.* at ¶ 10.

4 *Id.* at ¶ 13.

MNA argues that *All American Telephone* no longer holds any force because the 2011 *Transformation Order* implicitly overruled it. Although the *Transformation Order* said nothing about Section 201(b),[5] MNA argues that that order recast IXCs as "collaborators" with LECs under Section 251(b)(5) rather than their "customers," and that this means that Section 201(b) applies to nonpayment of tariffed access charges. As discussed in detail below, that conclusion is, to say the least, unsupported, and ignores the FCC's clear and repeated statements that "collections actions" do not state a violation of the Act.

Second, MNA argues that Sprint attempted to "claw back" payments to MNA that it had already made, and that this separately violates Section 201(b). But although MNA repeatedly says that Sprint attempted to claw back prior payments, it doesn't actually allege that Sprint took any action to do so. What MNA alleges is that Sprint objected to MNA's tariff, and stopped paying those objectionable charges *going forward*. It does not allege any acts by Sprint that would recoup *past* payments it had made. This argument is therefore irrelevant.

Moreover, even if Sprint did take action to recoup past overpayments, that does not violate Section 201(b). MNA relies on the Fifth Circuit's decision to the contrary, but that decision is simply wrong. The Fifth Circuit incoherently concluded in a split-panel decision that, although failure to pay a tariffed access charge does not violate Section 201(b), failure to pay a tariffed access charge to recoup prior overpayment *does* violate Section 201(b). That conclusion contradicts both logic and Commission precedent.

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[5] *See, generally, In the Matter of Connect America Fund*, 26 FCC Rcd. 17,663 (2011) ("*Transformation Order*").

FACTUAL BACKGROUND

MNA owns and operates a tandem switch in Kansas City, Missouri that connects to approximately 22 smaller carriers' end offices throughout Missouri. Since at least 2012, Sprint has delivered interexchange traffic to MNA's tandem switch for termination to the carriers that subtend that switch and have designated that switch in the Local Exchange Routing Guide industry database. During all of that time, MNA has had on file tariffs that list rates for tandem and transport service that are dramatically higher than the rates charged by AT&T, the incumbent LEC with the network in Missouri capable of providing the services currently provided by MNA. As Sprint will discuss in detail in its formal complaint against MNA, those tariffs violate the Commission's benchmarking and interstate-intrastate parity rules, and are therefore void *ab initio*.

MNA nevertheless has charged Sprint pursuant to its invalid tariffs since at least 2012, and until 2017, Sprint paid nearly all of MNA's asserted charges. But in 2017, Sprint reviewed MNA's tariffs and discovered that they listed access charge rates that were more than ten times what was lawful. Sprint wrote to MNA and requested a refund of what it had overpaid, but MNA refused to pay. MNA argued primarily that it was "not a LEC," and therefore not subject to any of the rules that limit tariffed access charges. In succeeding exchanges, MNA also asserted a number of additional arguments in support of its tariffs, including that, if it was a LEC, then it was a rural LEC, and that, if it wasn't a rural LEC, then it should benchmark to rural LECs. When the parties could not come to terms, Sprint sued MNA in Federal District Court for the District of Western Missouri, and sought repayment of its improper tariffed access charge payments.

MNA counterclaimed against Sprint for payment and a declaratory judgment, and also alleged that Sprint's non-payment of its tariffed access charges violated Section 201(b). The parties agreed to seek to refer all issues of federal communications law to the Commission *except* for the Section 201(b) issue. On that issue, Sprint sought referral but MNA opposed it, arguing that "the FCC and the courts already have considered whether regulatory self-help by a carrier violates Section 201(b)," and the "issue [does not] implicate any 'policy considerations' the FCC should properly address."[6] The district court rejected MNA's argument, and referred the Section 201(b) question to the Commission. MNA now effectuates the referral on the 201(b) question through its formal complaint. As discussed below, the complaint is without merit.

ARGUMENT

I. Sprint's Alleged Failure to Pay MNA's Unlawful Tariffed Rates Did Not Violate Section 201(b) of the Act.

MNA's Section 201(b) claim fails, first, because MNA's tariff is invalid, as Sprint will address in its own formal complaint. Nothing requires Sprint to pay unlawful access charges, and it is neither unjust nor unreasonable for Sprint to refuse to pay those unlawful charges. Sprint notes, however, that the authority precluding MNA from asserting a claim under Section 201(b) for failure to pay a tariffed access charge is very clear, and so urges the commission to confirm that authority here independent of the determination of the appropriateness of the charges assessed.

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[6] Joint Motion for Modification of Primary Jurisdiction Referral, *Sprint Communications Company L.P. v. Missouri Network Alliance, LLC*, No. 17-cv-597 D.E. 22 at 11-12 (W.D. Mo. Feb. 28, 2018).

Thus, setting the validity of the tariff aside, MNA's Section 201(b) claim fails because the failure to pay tariffed access charges does not violate Section 201(b).[7] As even MNA implicitly recognizes, the Commission made this point clearly in *All American Telephone*, which squarely forecloses MNA's Section 201(b) claims. To avoid this conclusion, MNA dresses up its ordinary collection action as one to enforce its rights under Section 251(b)(5). It is not a convincing disguise: MNA offers no textual basis in statute or regulation for its argument, nor do the cherry-picked quotations from Commission orders lend MNA any assistance. The Commission should find that *All American Telephone* forecloses MNA's claims, and dismiss them with prejudice.

In any event, whatever rationale the carrier-provider offers when assessing tariffed charges, and whatever rationale a carrier-customer offers when refusing to pay such tariffed charges, the carrier-provider cannot claim that the refusal to pay those tariffed charges constitutes an unjust and unreasonable practice under 47 U.S.C. § 201.

A. *All American Telephone* Forecloses MNA's Section 201(b) Claim.

The Commission's decision in *All American Telephone* bars MNA's Section 201(b) claim.[8] In *All American Telephone*, the Commission interpreted the Communications Act to hold that a failure to pay a tariffed access charge does not violate Section 201(b) or any other part of the Act. In that case, a local phone company complained that AT&T, acting as an IXC,

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[7] Section 201(b) provides in pertinent part, that "[a]ll . . . practices . . . in connection with [interstate or foreign communication by wire or radio], shall be just and reasonable, and any . . . practice . . . that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b).

[8] *All American Telephone* ¶ 10.

violated Section 201(b) by failing to pay tariffed access charges.[9] The Commission denied the claim, stating that it "has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of . . . section[] 201(b) . . . —even if the carrier's customer is another carrier."[10] This is because, as the Commission explained, the Commission's rules governing access charges apply to the *provider* of the service and not to the customer.[11] The Commission explained that the appropriate remedy for a *customer* failing to pay access charges was an action in court for breach of contract—not a claim before the Commission under Sections 206 or 208 of the Act for breach of the Act itself.[12]

Here, MNA's claim against Sprint arises from Sprint's alleged failure "to pay MNA's tariffed rates for the tandem services Sprint purchased from MNA."[13] This is precisely the kind of collection action that *All American Telephone* forecloses: Sprint is MNA's customer, purchasing tariffed services from MNA. Even were the terms of MNA's tariff to oblige Sprint to pay its tariffed access charges, the Act does not. Accordingly, MNA's claim, if it has one, is for breach of contract or its tariff—not for a violation of the Act under Section 201(b).

That should be the end of the analysis. But MNA resists the straightforward application of *All American Telephone* by arguing that the *Transformation Order* implicitly rejected that

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9 *See id.*

10 *Id.*

11 *See id.* ¶ 18 ("[T]he provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay.").

12 *See id.* ¶ 10.

13 *See* Compl. ¶ 45.

decision, and provided for the first time that failure to pay a tariffed access charge also violates the Communications Act. There is no basis for that argument.

As an initial matter, MNA agrees that the *Transformation Order* (which, incidentally, MNA says does not affect MNA itself), retained the tariffed access charge regime to effect the glide path to bill-and-keep compensation.[14] Under Section 251(g), carriers had been tariffing access charges since long before the *Transformation Order*, and so in the order, the Commission enacted a descending schedule that capped the rates at which carriers could tariff their services.[15] The Commission did not otherwise modify the mechanism for intercarrier compensation during the glide path period. MNA thus does not argue that the *Transformation Order* barred carriers from tariffing services at rates below the caps, or maintain that, aside from the new caps, the *Transformation Order* changed anything in practice about the tariffed access regime.

MNA instead argues that, even though its own tariff is identical today to what it was before the *Transformation Order*, the order nevertheless made non-payment of tariffed access charges a violation of Section 201(b). Since the order itself says nothing about this, MNA looks to the authorization for the *Transformation Order* in Section 251(b)(5) to support its position. MNA's primary argument is then that the *Transformation Order* obligates IXCs during the glide-path transition period to pay other carriers, since "carriers . . . are *obligated to pay* reciprocal compensation" under Section 251(b)(5).[16]

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[14] MNA Brief at 6–7.

[15] *See, generally, Transformation Order* ¶¶ 798–808.

[16] MNA Brief at 5–6 (emphasis in original); *see also id.* at 10–11 ("the Commission necessarily imposed a payment obligation on an IXC like Sprint").

But the Order in fact creates *no* obligation to pay reciprocal compensation to LECs during the transition period; it only endorses the already-existing obligation to pay access charges according to valid tariffs.[17] That is also what the implementing regulations provide.[18] The Commission has created mandatory payment regimes in other contexts,[19] but very plainly did not do so here. Instead, the regulations here restrict the rates that LECs may charge, but they do not impose a corresponding obligation on those LECs' customers to pay those charges.[20] MNA acknowledges that its tandem-switched access service was assessed out of its federal and state tariffs; that service is a component of Access Reciprocal Compensation under the

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[17] *See, generally, Transformation Order* at ¶¶ 798–808; MNA cites several paragraphs in the *Local Competition First Report and Order* for the proposition that "collaborating carriers are entitled to receive and are *obligated to pay* reciprocal compensation." *See* MNA Brief at 5-6 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶¶ 1034, 1045, 1087 (1996) ("*Local Competition First Report and Order*") (subsequent history omitted)). But the cited passages do not say that payments by collaborating carriers are a requirement of the Act. Rather, they make only the uncontroversial point that under reciprocal compensation arrangements, both parties receive compensation under those negotiated arrangements, not tariffs.

[18] *See, generally,* 47 C.F.R. § 51.901 *et seq.*

[19] *See, e.g.*, 47 C.F.R. § 64.1300(d) (providing that "[i]n the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494."); 47 C.F.R. § 64.1301(c) (version effective prior to Apr. 16, 2018) (providing that "[i]n the absence of a negotiated agreement to pay a different amount, if a [PSP] was not compensated for 0+ calls originating during the [Interim Period], . . . an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] in the default amount of $4.2747 per payphone per month during the same time period . . . .").

[20] *See, e.g.*, 47 C.F.R. § 51.905(b)("LECs who are otherwise required to file tariffs are required to tariff rates no higher than the default transitional rates specified by this subpart.").

Transformation Order.[21] If MNA wants to assess charges out of a tariff, it must follow the applicable regulatory obligations.

Further, even after the transition period is over and the bill-and-keep regime applies—a consideration not even relevant here—Section 251(b)(5) *still* does not establish an affirmative payment obligation. Section 251(b)(5) provides: "Each local exchange carrier has the following duties: . . . The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The duty under Section 251(b)(5) is to "establish" such arrangements, and moreover, it is an obligation *only* on LECs. And once an ILEC has met that obligation, payment enforcement against a CLEC or IXC is a matter of contract law.[22]

MNA can cite to no authority relating to tariffs or access charges to support its position, and so relies primarily on two decisions in which the Commission *did* establish mandatory carrier payment regimes. But this only makes MNA's error clearer. In MNA's first case, *Global Crossing Tele., Inc. v. Metrophones Tele., Inc.*, the Commission had required IXCs to pay payphone companies 49.4 cents per relevant payphone call, and the Supreme Court agreed that a failure to make those payments could violate Section 201(b).[23] Here, of course, there is *no*

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[21] *See, generally*, *Transformation Order* ¶¶ 798–808.

[22] The two cases cited by MNA establishing payment obligations, *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475 (5th Cir. 2000), and *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225 (4th Cir. 2012), are both cases involving interconnection agreements, not tariff claims. The former, *Southwestern Bell*, expressly applies the law of contracts to resolve a dispute over reciprocal compensation payment.

[23] 550 U.S. 45 (2007). *Global Crossing* involved Section 64.1300(d), which provides that "[i]n the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494." 47 C.F.R. § 64.1300(d).

regulation expressly requiring payment. Indeed, the plaintiff in *All American Telephone* attempted to rely on *Global Crossing* just as MNA does, and the Commission rejected the argument for the very same reason it is wrong here: in the tariffed access charge regime, no regulation establishes an affirmative payment obligation.[24] Instead, the Commission pointed out, the relevant provisions of the Act and the Commission's rules apply to the provider of the service, not to the customer.

MNA's reliance on *Contel of the South, Inc. v. Operator Communications, Inc.* is just the same.[25] There, the Commission found that the failure to pay similar expressly-required payphone compensation violated Section 201(b), while failure to pay a tariffed charge *did not* violate Section 201(b). The difference was, again, that regulations expressly required the payphone compensation, while no regulation required payment of the tariffed charge. The same applies here.[26]

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[24] *See All American Telephone* ¶ 17 ("The Commission has already explained why the payphone analogy raised by the CLECs fails. The Act requires the Commission to adopt rules ensuring that payphone service providers receive compensation for every completed call originated from their payphones. To implement that statutory directive, the Commission adopted rules requiring certain carriers to pay to originating payphone service providers a fixed amount for each completed payphone call handled by those carriers. In subsequent decisions, the Commission held that a carrier's failure to pay the amount required to be paid by the Commission's payphone compensation rules constitutes a violation of our payment rules and a violation of section 201(b) of the Act.") (internal references omitted).

[25] Memorandum Opinion and Order, 23 FCC Rcd. 548, 551, 555-56, ¶¶ 7, 10 (2008) (addressing a violation of Section 64.1301(c), which provided, prior to April 16, 2018. that "[i]n the absence of a negotiated agreement to pay a different amount, if a [PSP] was not compensated for 0+ calls originating during the [Interim Period], . . . an [IXC] to which the payphone was presubscribed during this same time period must compensate the [PSP] in the default amount of $4.2747 per payphone per month during the same time period . . . .").

[26] This is likewise true of *In re Empire One Telecommunications, Inc.*, a New York bankruptcy case that involved the failure of a CMRS provider to pay "reasonable compensation" under Section 20.11(b) of the Commission's rules. 458 B.R. 692 (Bankr. S.D.N.Y. 2011)

The authority that is in fact controlling here is, of course, *All American Telephone.* MNA thus offers two more arguments to distinguish that authority, but neither is persuasive. *First*, as noted above, MNA emphasizes that the Commission issued the *Transformation Order* after it issued the first *All American Telephone* decision. MNA argues that this supports the idea that the Commission never intended *All American Telephone* to continue in effect after it issued the *Transformation Order*.[27] But while the Commission initially decided *All American Telephone* before the *Transformation Order*, it affirmed *All American Telephone* on rehearing over a year *after* the *Transformation Order*.[28] And just as the *Transformation Order* said nothing to suggest it had reversed 20 years of precedent, the 2013 *All American Telephone* order provided the same. MNA therefore can find no support for its argument in the timing of the *All American Telephone* decisions.

Second, MNA argues that *All American Telephone* should not apply because, in the wake of the *Transformation Order*, Sprint became a "collaborator" with MNA rather than MNA's customer. But MNA's claim against Sprint arises from Sprint's alleged failure "to pay MNA's tariffed rates for the tandem services Sprint purchased from MNA."[29] That makes Sprint a

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(addressing a violation of 47 C.F.R. § 20.11(b)(2), which provides that "[a] commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial radio service provider.").

27 *See* MNA Brief at 17; *Transformation Order* ¶ 798 (2011).

28 *All Am. Tel. Co., e-Pinnacle Commc'ns, Inc., & ChaseCom v. AT&T Corp.*, 28 FCC Rcd. 3469 ¶ 11 (2013) (noting "the long-standing precedent that 'collection actions' fail to state a claim for violation of the [Communications] Act") ("*All American Reconsideration*").

29 *See* Compl. ¶ 45.

customer.[30] Moreover, IXCs have *always* been customers and "collaborators" in the completion of long distance calls. MNA itself cites to paragraph 1034 of the Commission's 1996 *Local Competition First Report and Order* to support its arguments here, and that *very paragraph* notes that "[a]ccess charges were developed to address a situation in which three carriers—typically, the originating LEC, the IXC, and the terminating LEC—*collaborate* to complete a long-distance call."[31] There is nothing new in the Commission's 2011 description of IXCs as collaborators with other carriers, and certainly nothing that suggests that the Commission intended to reverse *All American Telephone*. This distinction therefore also does not help MNA.

MNA's most audacious claim here is not simply that the Commission reversed its precedent without telling anyone. It is that, in all of this, MNA still claims that it is *not a LEC*. Section 251(b)(5) requires "*local exchange carriers*" to establish reciprocal compensation arrangements, and still MNA argues that that provision requires Sprint, an IXC, to pay MNA, a supposed non-LEC.[32] There is no basis for that argument, and certainly none in the sections of the *Transformation Order* that MNA cites support that conclusion.[33] Even more, MNA now claims that, because it is not a LEC, the only practical effect of the *Transformation Order* is that MNA may sue at the Commission and seek attorneys' fees, while it couldn't before, even when MNA's rates dramatically exceed the lawful rate. That argument is doctrinally wrong for all of

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30 *See* The Oxford American College Dictionary 337 (2002) (defining "customer" as "a person or organization that buys goods or services from another business.").

31 *Local Competition First Report and Order* at ¶ 1034 (emphasis added).

32 *See* MNA Brief at 1 fn. 2.

33 *See id.*, citing *Transformation Order* ¶¶ 762, 64.

the reasons we have explained, but also plainly inimical to the Commission's policy goal of eliminating the tariffed access charge regime.

B. Even if Non-Payment of Tariffed Access Charges Violated the Act, it Still Does Not Violate Section 201(b).

MNA asserts that failure to pay its tariffed access charges violates Section 251(b)(5) and Commission regulations. That argument is not only wrong, but also insufficient. Even if the Commission had found that non-payment of tariffed access charges violated Section 251(b)(5) following the *Transformation Order*, nonpayment is still not "unjust and unreasonable" within the meaning of Section 201(b).

Not every violation of Commission regulations is an unjust and unreasonable practice.[34] In determining whether a violation is "unjust and unreasonable" under Section 201(b), the Commission has considered whether such a violation was (1) a direct violation, rather than the violation of a tariff or contract; and (2) whether the violation undermines the attainment of an express Congressional goal.[35] Sprint's violation, if any, is of a tariff, and MNA likewise fails to explain how Sprint's nonpayment of access charges "undermines the Commission's goals in reforming the intercarrier compensation system."[36] The Commission's reform of intercarrier compensation depends on carriers adjusting their rates in accordance with the Commission's rules—something MNA has refused to do—and not on the prompt payment of those carriers'

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[34] *See Global Crossing*, 550 U.S. at 56 ("Nor do we suggest that every violation of FCC regulations is an unjust and unreasonable practice.").

[35] *See, e.g., APCC Services, Inc. v. NetworkIP, LLC, Order on Review*, 21 FCC Rcd. 10488 ¶ 15 (2006), *aff'd in relevant part and remanded in part sub nom., NetworkIP, LLC v. FCC*, 548 F.3d 116 (2008).

[36] *See* MNA Brief at 11.

customers. Moreover, Sprint's nonpayment is particularly reasonable in light of the uncertainty about the lawfulness of MNA's tariffs. So even if the Commission were to conclude that nonpayment here violated Section 251(b)(5), it would still not be an "unjust and unreasonable" practice under Section 201(b).[37]

II. Sprint's Withholding of Disputed Tariffed Access Charges on Invoices Going Forward Constitutes Neither a Claw Back nor a Section 201(b) Violation.

MNA separately claims that Sprint violated Section 201(b) by attempting to "claw back" previous payments. That claim fails as well. First, MNA mischaracterizes Sprint's withholding of objectionable charges *going forward* as a "claw back" tactic and, consequently, fails to allege any actual "claw back" by Sprint in the present dispute. Second, even assuming that Sprint withheld undisputed payments to MNA to effect a refund, MNA's only support for the claim that this violates Section 201(b) is a wrongly-decided decision by the Fifth Circuit. The Commission, by contrast, has long held that failure to pay tariffed access charges—for whatever reason or no reason—does not violate Section 201(b).

A. MNA Alleges No Actual "Claw Back" Scheme.

MNA fails to allege any acts by Sprint that would recoup past payments to MNA, regardless of its conclusory statements that Sprint employed a "'claw back' tactic to obtain a retroactive refund on amounts previously paid to MNA."[38] What MNA actually alleges is that

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[37] *See also Level 3 Commc'ns, LLC v. Illinois Bell Tel. Co.*, No. 13-CV-1080, 2014 WL 414908, at *5 (E.D. Mo. Feb. 4, 2014) (holding that a violation of Section 251(b)(5) did not also violate Section 201(b)).

[38] MNA Complaint ¶¶ 47-48; *see also id.* ¶ 4 (describing in conclusory fashion that Sprint engaged in a "'claw back' tactic" by "withholding payment on MNA invoices in an attempt to help itself to a retroactive refund of amounts that Sprint paid MNA and only disputed after the fact"); *id.* ¶42; MNA Brief at 2, 13-15.

Sprint "effectively stopped paying MNA's invoices from March 2017 until it discontinued using MNA's tandem in May 2018."[39] This is the only action MNA cites to claim that "Sprint helped itself to a retroactive refund . . . . to recoup charges that Sprint belatedly disputed but nonetheless paid to MNA."[40] According to MNA, Sprint sent dispute letters contesting the validity of MNA's tariffed charges for tandem services and, "[c]oincident[ally]" with these dispute letters, "effectively stopped paying MNA's invoices for the tandem services."[41] In other words, MNA says that Sprint withheld payment of disputed amounts invoiced by MNA. That is not an allegation that Sprint sought to recoup past overpayments.

Similarly, "disparity in the disputed amounts" between the earlier and later group of invoices, as alleged by MNA,[42] does not constitute an act by Sprint to recoup prior payments. Those allegations merely show that Sprint began withholding payment of disputed amounts once it sent out the March 2017 Dispute Letters. To allege that Sprint's non-payment was an attempt to effect a refund, MNA must do more than state percentage differences between the charges disputed in earlier paid invoices and later, largely unpaid invoices. MNA fails to offer any detail on which charges within the "more than 98 percent" withheld by Sprint allegedly do

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39 MNA Complaint ¶ 47; *see also id.* ¶¶ 4, 42; MNA Brief at 2, 14–15.

40 MNA Complaint ¶ 47; *see also* MNA Brief at 13–15.

41 MNA Complaint ¶ 33; *see also* MNA Brief at 15.

42 MNA Brief at 15; MNA Complaint at ¶ 33. MNA states that "[f]or invoices dated March 1, 2017 through April 1, 2018, Sprint paid on average less than two percent of the invoiced amount, withholding payment of approximately 98 percent of MNA's invoices," while "for MNA's invoices dated January 1, 2011 through February 1, 2017, Sprint withheld payment of approximately 1 percent of MNA's invoices." *Id.* MNA also alleges that Sprint "disputed 53 percent of MNA's charges for invoices dated January 1, 2011 through February 1, 2017 as compared to more than 98 percent of MNA's charges that Sprint disputed for invoices dated March 1, 2017 through April 1, 2018." MNA Brief at 15.

not correspond to what Sprint currently disputes. Based on MNA's description, Sprint, rather than recouping *past* payments, simply stopped paying objectionable access charges *going forward*, on the grounds that MNA lacked a valid tariff. This is not a "retroactive refund."

CenturyTel only reinforces MNA's failure to allege any "claw back" action undertaken by Sprint. In that dispute, CenturyLink "t[ook] issue with Sprint's clawing-back of retroactively-disputed amounts it had already paid by deducting them from undisputed charges billed by CenturyLink."[43] Sprint disputed CenturyLink's access charges for VoIP-originated calls and "withheld payments to CenturyLink for undisputed traditional-format-to-traditional-format calls" until Sprint recovered an amount equal to its alleged overpayment for VoIP-originated calls.[44] As discussed below, the Fifth Circuit in *CenturyTel* contravened longstanding Commission precedent and erred in finding a Section 201(b) violation. But even if *CenturyTel* were correctly decided, MNA's reliance on the case is misplaced. *CenturyTel* recognized that Sprint effected a refund by withholding payments on invoices going forward for a class of payments it *never* disputed (access charges for TDM-originated calls) to recoup another class of payments that Sprint disputed (access charges for VoIP-originated calls).[45] Because Sprint never disputed charges for TDM-originated calls, CenturyLink demonstrated that withholding those charges for later invoices served no purpose other than to recoup past

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[43] *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 861 F.3d 566, 576 (5th Cir. 2017) ("*CenturyTel*").

[44] *Id.* at 577; *see also CenturyTel of Chatham v. Sprint Commc'ns Co.*, 185 F. Supp. 3d 932, 936-37 (W.D. La. 2016) (describing Sprint's recoupment process and noting that Sprint never disputed CenturyLink's access charges for TDM-originated calls).

[45] *CenturyTel*, 861 F.3d at 576-77.

payments for VoIP-originated calls. In contrast, based on MNA's allegations, Sprint objected to MNA's tariff and withheld payment for the very class of payment that Sprint disputes (access charges for MNA's tandem service) on invoices going forward.[46] MNA does not allege that Sprint withheld a separate class of undisputed payments or allege any other act that would recoup past payments. So MNA does not actually allege a factual basis for its argument that Sprint violated Section 201(b) by effecting a retroactive refund.

Finally, even if Sprint recouped prior payments from MNA, that still does not violate Section 201(b). In *All American Telephone*, the FCC made clear that non-payment of tariffed access charges does *not* violate Section 201(b).[47] Never has the Commission held that non-payment of tariffed charges, even to effect "self-help" and recoup disputed payments, constitutes a Section 201(b) violation. Nor does the Commission's decision hinge on whether the non-payment was justified. Instead, the FCC clarified that while it did not "endorse" non-

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[46] *See* MNA Complaint ¶¶ 30- 33.

[47] *All American Telephone* ¶ 18 ("[T]he provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay. Thus, failure to pay does not breach any provisions of the Act or Commission rules."); *All American Reconsideration* ¶ 5. *All American* is part of a series of decisions, dating back to the late 1980s, where the Commission held that non-payment of tariffed access charges does not violate *any* part of the Communications Act. *Tel-Central v. United Tel. Co., Memorandum Opinion and Order*, 4 FCC Rcd. 8338, 8340-41, ¶ 16 (1989); *Long Distance/USA, Inc., Am. Sharecom, Inc., Mid-Am. Long Distance Co., Telemarketing Investments, Ltd., Nat'l Telecom of Austin, & Total-Tel, USA*, 7 FCC Rcd. 408 (1992); *American Sharecom, Inc. v. Mountain States Tele. & Telegraph Co., Memorandum Opinion and Order*, 8 FCC Rcd. 6727 (Com. Car. Bur. 1993); *C.F. Communications Corp. v. Century Tel. of Wisconsin, Memorandum Opinion and Order*, 8 FCC Rcd. 7334 (Com. Car. Bur. 1993); *Beehive Tele., Inc. v. Bell Operating Cos., Memorandum Opinion and Order*, 10 FCC Rcd. 10562, 10569, & n.90 (1995); *America's Choice Communications, Inc. v. LCI International Telecom Corp., Memorandum Opinion and Order*, 11 FCC Rcd. 22494, 22504 (FC&I Br., Enf. Div., Com. Car. Bur. 1996).

payment of tariffs "outside the context of any applicable tariffed dispute resolution provisions," such non-payment did not "violate[] the Act itself [including Section 201(b)]."[48] By this logic, even in the counterfactual where Sprint lacks any basis to recoup past overpayments, its non-payment at most violates MNA's tariff, not Section 201(b). MNA's claim is without merit.

Without Commission precedent to support its claim, MNA instead relies on the Fifth Circuit's erroneous decision in *CenturyTel*. There, the Fifth Circuit turned Commission precedent on its head by concluding that although failure to pay a tariffed access charge does not violate Section 201(b), failure to pay a tariffed access charge to recoup prior overpayment *does*.[49] This is wrong. Importantly, the Fifth Circuit correctly recognized that the Commission has *never* affirmatively stated that non-payment of a tariffed access charge to recoup prior overpayment violates Section 201(b).[50] Yet it still misinterpreted the Commission's "guidance" to find a Section 201(b) violation.

The Fifth Circuit's decision runs counter to the Commission's affirmative statements that non-payment of a tariffed access charge does not violate Section 201(b). Not only has the Commission noted numerous times that "collections actions" for unpaid tariffed charges do not state a violation of the Act,[51] it has also expressly distinguished its "self-help" decisions as *not*

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48 *All American Telephone* ¶ 13.

49 *CenturyTel*, 861 F.3d at 577-78.

50 *See id.* at 577 ("The FCC has not squarely addressed the propriety of the claw-back scheme Sprint utilized.").

51 Since 1989, the Commission has made clear that the "statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges." *See, e.g., Tel-Central v. United Tel. Co.*, 4 FCC Rcd. at 8340-41 ¶ 16; *All American Reconsideration* ¶ 11 (noting "the long-standing precedent that 'collection actions' fail to state a claim for violation of the [Communications] Act").

relating to Section 201(b).[52] Consistent with these decisions, if non-payment of a tariffed access charge does not violate Section 201(b), then non-payment of a tariffed access charge to recoup prior overpayment, as a subset of the former, does not violate Section 201(b). To conclude otherwise contradicts both logic and FCC precedent. Therefore, even assuming Sprint took action to recoup prior payments for MNA's tandem services, it is nothing more than a non-payment of tariffed charges. MNA fails to state a claim for a Section 201(b) violation.

CONCLUSION

The Commission should dismiss MNA's complaint with prejudice.

[52] *See Bell-Atlantic Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd. 20,665, 20,677, ¶ 29 (2000) (holding that the decisions in which the Commission had addressed issues of self-help "only mean that the use of 'self-help' undercuts a claim of irreparable injury for the purpose of emergency relief"); *All American Telephone* ¶ 13, n.37 (explaining that the FCC's "self-help" decisions did not "(1) involve[] a claim for collection of tariffed charges; [or] (2) hold[] that the alleged failure to pay tariffed charges constitutes a violation of the [Communications] Act").

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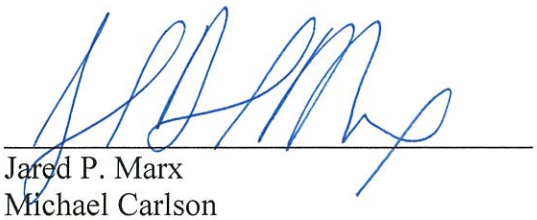
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August 2018, I electronically filed the foregoing pleadings with the Federal Communications Commission via the ECFS filing system. I also certify that a copy of the foregoing pleadings was served by electronic mail to the following:

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